QUESTIONS PRESENTED

Plaintiffs allege that, from among a pool of qualified applicants for hiring, promotions, transfers and rehiring, the State Officials have favored those who are Republicans or Republican supporters, or friends or relatives of Republicans, or sponsored by Republicans or friends of the Governor, or sponsored by members of the Illinois legislature who are deemed to be friends or supporters of the Governor.

1. Do the First and Fourteenth Amendments prohibit elected state and local officials from taking these kinds of considerations into account when they hire nonpolicymaking public employees?

2. Do the First and Fourteenth Amendments prohibit elected state and local officials from taking these kinds of considerations into account when they grant desired promotions or transfers to existing nonpolicymaking public employees, or rehire former nonpolicymaking employees who have been laid off?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Nos. 88-1872 and 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents,

and

MARK FRECH, *et al.*,

Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON THE MERITS OF RESPONDENTS/CROSS-PETITIONERS

STATEMENT OF THE CASE

A. The Complaint

On July 1, 1985 plaintiffs Cynthia Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer and James Moore (collectively, "plaintiffs") filed this purported class action against the Republican Party of Illinois and of each county of Illinois, two Republican Party officials, Governor James R. Thompson and seven former or current state government officials.[1] Plaintiffs allege that the State Officials and the other defendants created an employment system in which certain personnel decisions are "substantially motivated" by considerations of friendship and politics (R.A. 7, ¶ 11f),[2] so that political and financial supporters of the Republican Party "are favored in regard to State of Illinois employment." (R.A. 2, ¶ 1.)

[1] This brief is submitted on behalf of James R. Thompson, Mark Frech, Greg Baise, William Fleischli, Randy Hawkins, Kevin Wright, James Reilly and Lynn Quigley (collectively, "the State Officials"). The Republican Party of Illinois and of each county of Illinois, Don W. Adams, and Irvin Smith are also Respondents/Cross-Petitioners in this proceeding. Counsel for those parties have indicated that they intend to adopt the Brief On The Merits filed by the State Officials.

[2] A copy of the complaint has been reproduced in the Respondents' Appendix ("R.A."), attached to the State Respondents' Brief In Opposition, at R.A. 1-32. The opinions of the District Court and the Seventh Circuit will be cited herein by their placement in the Petitioners' Appendix ("Pet. App."), attached to the Petition for Writ of Certiorari. The District Court's opinion also is reported at 641 F. Supp. 249. The decision of the Seventh Circuit *en banc* is reported at 868 F.2d 943. Plaintiffs' brief on the merits will be cited herein (Pl. Br.). In addition, Independent Voters of Illinois, *et al.* ("IVI"), the National Education Association, the AFL-CIO, and the North Carolina Professional Firefighters Association have submitted amicus briefs in support of plaintiffs' claims. Those briefs will be cited herein (IVI Br.), (NEA Br.), (AFL Br.) and (NCF Br.), respectively.

Plaintiffs allege that as part of these considerations in the employment process, the State Officials make use of voting records and also take into account an individual's "financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level." (R.A. 7, ¶ 11g.) The alleged purpose and effect of defendants' conduct is to "limit State employment and the benefits of State employment to those who are politically favored . . . and thereby provide the Governor, the Republican Party and Republican candidates for political office with political campaign contributors and to discourage opposition to the Governor and the Republican Party in elections." (R.A. 8, ¶ 11k.)

The considerations which the State Officials allegedly take into account in the employment process are not limited to partisan support for the Republican Party. Instead, they encompass a variety of factors which extend beyond partisan political affiliation. Plaintiffs allege that (R.A. 7, ¶ 11f):

> "In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the 'Governor's Office of Personnel' are substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson."

Thus, plaintiffs do not allege in their complaint a strict partisan patronage system for making decisions relating to hiring, promoting, transferring and rehiring public employees. Rather, they allege that these decisions are substantially affected by consideration of the applicants' or employees' (1) affiliation with or financial support of the Republican Party,

or (2) friendship with a Republican, or (3) family relationship with a Republican, or (4) sponsorship by a Republican, or (5) friendship with Governor Thompson, or (6) support of Governor Thompson, or (7) sponsorship by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Governor Thompson, or (8) some combination of these factors. (See R.A. 7, ¶ 11f.) Under the alleged system complained of, the favored applicant for hiring, promotion, transfer or rehiring may have no direct connection whatever to the Republican Party (*e.g.*, a friend of a Democratic member of the Illinois legislature who is a friend of the Governor).

Further, plaintiffs do not allege in their complaint that those who were selected instead of plaintiffs for hiring, promotion, transfer and rehiring were unqualified for the positions they obtained. Nor do plaintiffs claim that the successful candidates failed to meet the requirements of the Illinois Personnel Code ("the Code"). *Ill. Rev. Stat.*, ch. 127, ¶ 63b101 *et seq.* (1985).

The specific allegations of the complaint regarding each plaintiff are as follows:

Plaintiff Moore alleges that he unsuccessfully sought employment with the state from 1978 through mid-1985. (R.A. 17, ¶ 23b.) During that seven-year period, two relatives of Republican Party officials and one person allegedly affiliated with the Republican Party were "hired by State government in positions for which Plaintiff Moore was qualified." (R.A. 17, ¶ 23e.) Moore alleges that he received a letter from a state representative suggesting that he contact local officials of the Republican Party (R.A. 17, ¶ 23c; R.A. 25-26), and that when he did so, he was told that he needed to get two signatures to obtain a job. (R.A. 17, ¶ 23d.) Moore does not allege that the candidates who were hired instead of Moore were unqualified, or that he was more qualified than those other candidates.

Plaintiff Rutan alleges that since the Fall of 1981, she has applied for promotions to supervisory positions within her department. (R.A. 14, ¶ 19b.) Rutan does not allege that these positions were awarded to unqualified employees, but rather that the positions she sought were filled by persons who were less qualified than she but favored by the Governor's Office of Personnel. (R.A. 14, ¶ 19g.) Rutan claims that in 1983 she obtained a copy of a form allegedly used by defendants in promoting employees. (R.A. 14, ¶ 19e; R.A. 24.) The form asks qualified applicants if they are willing to work for or contribute money to the Republican Party. (R.A. 24.) The form also asks applicants for promotions to indicate the name, date, and grade of the test taken under the Code which qualifies them for the desired promotion. (*Id.*)

Plaintiff Taylor alleges that he failed to obtain a promotion which he claims was awarded to another state employee "who was less qualified and had less seniority" but who had the support and approval of the Republican Party. (R.A. 15, ¶ 20c.) Taylor does not allege that the person who received the promotion was unqualified. Taylor also claims that he did not receive a desired transfer to another county because the transfer was opposed by local Republican Party officials. (R.A. 15, ¶ 20f.) Taylor does not allege that another employee (whether more, equally or less qualified) received the transfer which he desired, or that any other employee was transferred to any other county.

Plaintiff Standefer alleges that he was hired in a temporary position in the Spring of 1984 and, along with five other employees, was laid off in November 1984. (R.A. 15, ¶ 21a, b.) Standefer does not challenge the propriety of the layoff. Standefer claims that the other five individuals "had the support of the Republican Party" and received new offers for state employment, but that Standefer—who allegedly once had voted in the Democratic primary at some unstated time in the past—did not receive another job offer. (R.A. 15, ¶ 21c-e.) However, Standefer does not allege that the other

five employees held temporary positions, as he did, which limited his term of employment to a period of six months. *See Ill. Rev. Stat.* ch. 127, ¶ 63b108b.9 (1985). Nor does Standefer claim that the persons who were offered other jobs were unqualified for the state jobs, or that he was more qualified than they for the jobs.

Plaintiff O'Brien alleges that he was laid off from a state job in April 1983, after 12 years of state employment. (R.A. 15-16, ¶ 22a, b.) He does not challenge the layoff; nor does he claim that another person was hired to replace him. O'Brien claims that he was not recalled to his previous position, and that several months later—after he obtained the support of the Chairman of the Republican Party of Logan County—he received another state job with less seniority and salary. (R.A. 16, ¶ 22d, e, g.)

Plaintiffs do not claim that they have been discharged, demoted, harassed or punished in any way for their political beliefs or affiliation. Rutan and Taylor do not allege that their titles, responsibilities, salaries or employment status were in any way affected when they failed to obtain desired promotions or transfers. Neither Standefer nor O'Brien contends that he was laid off due to his political affiliation or nonaffiliation. Plaintiffs do not allege that they were coerced to work for, vote for, or contribute money to the Republican Party or its candidates.

Nonetheless, plaintiffs claim that the consideration of friendship and "politics" as alleged in the complaint violates their rights to freedom of speech and association. (R.A. 17, ¶ 24a.) As relief from this allegedly unconstitutional employment system, plaintiffs seek $1.02 billion in compensatory and punitive damages and the imposition of a receivership "to take control of and operate the hiring and promotion system of the State of Illinois for departments, boards and commissions under the jurisdiction of the Governor." (R.A. 22, ¶ 12.)

B. Proceedings in the District Court

The District Court dismissed the complaint in its entirety for failure to state a claim. (R. 73; R. 77, at 33-35.) *See* Pet. App. C-1. The District Court held that plaintiffs failed to state a claim under the First Amendment because their vague and inconclusive allegations that defendants used "political considerations" in hiring, promoting, transferring and rehiring state employees is distinct from the situation presented in *Elrod v. Burns*, 427 U.S. 347 (1976), in which this Court prohibited the dismissal of public employees based solely on their political affiliation. Pet. App. C-5; C-11.

The District Court determined that this Court's prior decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), did not govern plaintiffs' claims because "any incidental effect that might flow from the use of political considerations in [the challenged] employment decisions does not trigger the analysis of *Keyishian* and other cases that involve direct restrictions on speech." Pet. App. C-13. The District Court also held that plaintiffs' allegations that other candidates received the jobs or promotions which they themselves desired did not constitute "punitive personnel actions in retaliation for their exercise of protected First Amendment speech." Pet. App. C-10.[3]

[3] The District Court's dismissal of plaintiffs' complaint for failure to state a claim rendered it unnecessary to address the State Officials' claim of qualified immunity. The Seventh Circuit requested the District Court to address this claim on remand. Pet. App. A-30 n.6. Even if this Court determines that one or more of the plaintiffs have stated a claim, the requests for monetary relief must be dismissed under the doctrine of qualified immunity because the "rights" which plaintiffs assert in this case will have been established by this Court in this proceeding; they previously have not been recognized much less clearly and consistently established by the courts. *See Mitchell v. Forsyth*, 472 U.S. 511, 530-31 (1985); *Davis v. Scherer*, 468 U.S. 183, 191 (1984). In the alternative, the Court can order the District Court to consider this issue in the event a remand is necessary.

C. Proceedings in the United States Court of Appeals for the Seventh Circuit

By a divided vote, a panel of the Seventh Circuit affirmed the District Court's dismissal of plaintiff Moore's hiring claim, holding that the failure to obtain a particular position does not sufficiently affect First Amendment freedoms to state a constitutional claim. Pet. App. B-23-24. The panel remanded the claims of plaintiffs Rutan, Taylor, Standefer and O'Brien ("the employees") for a determination whether their failure to be promoted, transferred or rehired was "the substantial equivalent of dismissal." *Id* at B-23.[4]

After a rehearing *en banc*, the Seventh Circuit reinstated the panel majority's opinion virtually unchanged. Pet. App.

[4] The panel affirmed, without dissent, the District Court's dismissal on standing grounds of plaintiffs' allegations, as voters, that the alleged employment system deprived them of "equal access and effectiveness of elections." Pet. App. B-30. Following its prior decision in *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988), and the decision of the District of Columbia Circuit in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the Seventh Circuit concluded that "the injury asserted in the complaint is not fairly traceable to the challenged action." Pet. App. B-31. The Seventh Circuit's subsequent *en banc* decision unanimously adopted this holding. Pet. App. A-32.

Plaintiffs have not sought review of the Seventh Circuit's decision on this issue, which is fully consistent both with this Court's precedents on standing and with decisions of other courts of appeals. Although plaintiffs' claim as voters is no longer a part of this case, amici IVI devote substantial portions of their brief to the argument that the employment practices alleged in the complaint deny "the public's rights to a free and fair political and electoral process." (IVI Br. 7; *see id.* at 14-18.) This argument is not relevant to the issues before the Court; it also is manifestly incorrect in light of this Court's decisions on standing and the Seventh Circuit's decision in *Shakman*, which IVI fails to cite in its brief. IVI's failure to cite *Shakman* hardly could have been an oversight; Mr. Shakman, one of the plaintiffs in that litigation, is himself a party to IVI's amicus brief.

A-1. Following its prior decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), and the decision of the Sixth Circuit in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the Court of Appeals determined that the burdens which the alleged employment practices impose on the First Amendment rights of job applicants do not rise to the level of a constitutional deprivation. Pet. App. A-24. Drawing on the plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1984), the Court reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." Pet. App. A-24. Furthermore, "[a]ny burden imposed on an employment applicant does not outweigh the significant intrusion into state government required to remedy such a claim." *Id.*

The *en banc* Court recognized that, with regard to the claims of the employees, it was undetermined "whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment." Pet. App. A-13. To resolve the constitutionality of the promotion, transfer, and rehiring claims alleged in the complaint, the Court of Appeals adopted the "substantial equivalent of dismissal" test enunciated in *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980). Pet. App. A-17.

Although the Seventh Circuit adopted the *Delong* analysis, it distinguished the allegations in this case from the claims of political retaliation that were at issue in *Delong*. This case does not involve allegations of adverse employment actions—like the involuntary transfer and reassignment in *Delong*—designed to punish employees for the exercise of free speech. Here, plaintiffs Rutan, Taylor, Standefer and O'Brien complain that other employees received more favorable treatment from their public employer. (R.A. 2, ¶ 1.)

In remanding this case for a determination of the employees' claims, the Court of Appeals expressed substantial doubt

that they could meet the *Delong* standard on the basis of the allegations stated in the complaint. Pet. App. A-25, 27-28, 29. Distinguishing those cases in which employees were punished for the exercise of protected speech, the Court emphasized that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Id.* at A-23 n.4.

One judge dissented as to the dismissal of plaintiff Moore's hiring claim. *Id.* at A-33. Two judges dissented from the majority's adoption of the "substantial equivalent of dismissal" standard to govern the employees' claims. *Id.*[5]

SUMMARY OF ARGUMENT

Plaintiffs apparently recognize that the factual allegations actually made in their complaint do not raise a constitutional issue under the doctrine of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Thus, in their brief, plaintiffs abandon those allegations, and they argue instead that this case involves the type of strict partisan political patronage system that was involved in *Elrod*. This argument directly conflicts with the allegations of plaintiffs' complaint.

The complaint alleges that certain employment decisions are "substantially motivated" by a myriad of considerations which include politics, family relations and friendships. This system obviously can cut across party lines. Plaintiffs now assert in their brief that the State Officials have used a strict political litmus test to exclude non-Republicans based solely

[5] Throughout this brief, we refer to Mr. Moore's claim as the "hiring claim." We frequently refer to the promotion, transfer and rehire claims of plaintiffs Rutan, Taylor, Standefer and O'Brien as "the employees' claims."

on party affiliation. (*Compare* R.A. 7, ¶ 11f *with* Pl. Br. 16.) Distorting the allegations in their complaint, plaintiffs assert in their brief that job seekers *must* vote in the Republican primary, contribute money to the Republican Party and volunteer to work for the Republican Party even to be considered for a job. (Pl. Br. 21.) Plaintiffs now proclaim—with no factual basis in their complaint—that all State of Illinois employees must take an oath of loyalty to the Republican Party in order to be hired, promoted, transferred or rehired. (Pl. Br. 35.)

Plaintiffs and their amici effectively ask this Court to pass on the constitutionality of a hypothetical "employment system" that bears little resemblance to the allegations of the complaint. At the time of the District Court's original dismissal of the complaint, plaintiffs declined to file an amended complaint, but instead elected to stand on the adequacy of their initial pleading. As a result, the legal significance of plaintiffs' claims must be determined by reference to the well-pleaded facts alleged in the complaint. Their attempt to raise claims in this Court which were not pleaded, litigated or decided in the Courts below should be rejected.

Part I of this brief discusses plaintiff Moore's hiring claim. We demonstrate that the First and Fourteenth Amendments do not prohibit elected state and local officials from using the kinds of considerations involved here when they hire public employees from a pool of qualified applicants. In both *Elrod* and *Branti*, the Court reviewed a strict partisan employment system which commanded the discharge of existing employees who were performing satisfactorily on the sole ground that they belonged to the "wrong" political party. *Elrod*, 427 U.S. at 349 (plurality opinion); *Branti*, 445 U.S. at 508. As a result of the strict nature of the system, the Court in *Elrod* found substantial support for its ruling in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and other decisions invalidating "loyalty oaths" as a condition for continued public employment. *See Elrod*, 427 U.S. at 357-

58 (plurality opinion). In *Elrod*, as in *Keyishian*, the public employer did not weigh relevant factors or even consider an employee's performance; the plaintiffs were discharged or threatened with discharge solely as a result of their political beliefs or affiliation. No such system is involved in this case.

In Part I A, we demonstrate that, contrary to the arguments of plaintiffs and their amici, the complaint does *not* allege a strict partisan political patronage system designed to reward Republicans and only Republicans with jobs. Plaintiffs have not alleged, for example, that Democrats, applicants recommended by Democratic office-holders, or applicants who have no political affiliation, are precluded from obtaining a state job based solely on their party affiliation or lack thereof. Thus, neither the hypothetical posited by the Court in *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), nor the "loyalty oath" cases cited in *Elrod*, are relevant here.

In Part I B, we demonstrate that the principal concern underlying *Elrod*—that automatic partisan firing has a chilling effect on the First Amendment rights of the affected employees—is not implicated by the hiring decisions involved here. *Elrod*'s limitation on the most extreme manifestation of traditional patronage practice—the dismissal or threat of dismissal of existing employees—was based on the concern that employees will be discouraged from expressing their true political beliefs if it might cost them their jobs. *Elrod*, 427 U.S. at 359. Here, in contrast, the state's failure to hire an applicant such as Mr. Moore does not impose a comparable burden on First Amendment freedoms, and accordingly does not raise a constitutional issue.

Part II discusses plaintiffs' promotion, transfer and rehiring claims. In Part II A, we demonstrate that there is no cognizable claim for a failure to be promoted, transferred or rehired under the circumstances alleged in the complaint. Here, as in the hiring context, any limited burdens imposed on the First Amendment rights of the affected employees by

the use of considerations of friendship and politics among qualified employees do not give rise to a constitutional claim.

In addition, as we show in Part II B, there is a significant difference between plaintiffs' allegations that certain favorable employment decisions are "substantially motivated" by such considerations (R.A. 7, ¶ 11f), and cases involving the imposition of punitive employment sanctions in direct retaliation for political belief or expression. See Pet. App. at A-23 n.4; *Id.* at C-10-11, 13. There is no allegation in this case that plaintiffs Rutan, Taylor, Standefer or O'Brien have been reprimanded, demoted or in any way punished in retaliation for their political beliefs. The employees complain only that other qualified employees have been favored with promotions, transfers or rehire decisions which plaintiffs hoped to obtain. No strict partisan political qualification is involved. The First Amendment does not require a ban on friendship and political considerations under these circumstances.

In Part III, we demonstrate that prudential considerations weigh strongly against extending the reach of *Elrod* to the dramatically different employment practices alleged here. Interference by federal courts with the operations of state and local government will be increased significantly if *Elrod* is extended to cover all prospective employees who are not hired and all employees who fail to obtain a desired promotion, transfer or rehire. Such a sweeping rule of constitutional law would require federal courts to serve as "platonic guardians" over the personnel practices of fifty states and thousands of local government offices.

Plaintiffs and their amici suggest that such judicial oversight not only is proper, but is essential to ensure that elected officials do not favor certain qualified employees on the basis of friendship or "politics," just as they cannot discriminate on the basis of race or religion. However, unlike racial or religious discrimination, there is no constitutional principle which prohibits friendship, "politics" and other "connections" from being considered in public employment.

These types of considerations traditionally have been, and remain today, an integral part of our political and social landscape. Thus, the decisions of this Court and constitutional prohibitions outlawing discrimination on the basis of race and religion do not support plaintiffs' claims in this case.

In the end, the First Amendment does not preclude elected state and local officials from considering friendship and "politics" in the employment contexts raised in this case. The Court's narrow ruling in *Elrod* should not be expanded in the manner and to the extreme degree urged by plaintiffs.

ARGUMENT

I.

THE HIRING PRACTICES ALLEGED IN THE COMPLAINT ARE WELL WITHIN CONSTITUTIONAL LIMITS.

In *Elrod v. Burns*, this Court held that the First and Fourteenth Amendments prohibit the dismissal or threat of dismissal of nonpolicymaking employees based solely on party affiliation. *Elrod*, 427 U.S. at 375 (concurring opinion). In *Branti v. Finkel*, this Court reaffirmed that political affiliation cannot be the sole basis for depriving some incumbent public employees of continued employment. *Branti*, 445 U.S. at 516.

This case presents the Court with an issue not decided in those cases: whether the First and Fourteenth Amendments to the Constitution prohibit elected state and local officials from taking into account friendship and political connections at the opposite end of the employment spectrum—in the hiring of public employees.[6] We demonstrate

[6] Plaintiffs and their amici suggest that this issue is foreclosed by the Court's decisions in *Elrod* and *Branti*. (Pl. Br. 29-30; NEA Br. 16; IVI Br. 21; AFL Br. 19-20; NCF Br. 7, 8.) *Elrod* and *Branti* themselves expressly refute this suggestion. Although Justice Brennan's plurality opinion in *Elrod* recognized that "political patronage comprises a broad range of activities," including placing loyal supporters in government jobs, he emphasized that the only issue before the Court was "the constitutionality of dismissing public employees for partisan reasons." 427 U.S at 353 (Brennan, J., plurality opinion). Justice Stewart's narrow concurring opinion, joined by Justice Blackmun, confirms that the limited reach of *Elrod* does not extend to the employment practices alleged in this case. *Id.* at 374-75 (Stewart, J., concurring). Likewise, in *Branti*, the Court expressly stated that the only practice at issue was the firing of public employees solely for partisan reasons. 445 U.S. at 513 n.7. The Court therefore declined to address the defendant's contention that the hiring of employees in the public defender's office warranted a different result. *Id.*

below that plaintiff Moore's hiring claim properly was dismissed because the type of hiring practices alleged and their effect, if any, on applicants like Moore each distinguish *Elrod* and require a different result.

A. The *Elrod* Principle Does Not Preclude Consideration Of The Friendships And Politics Of Qualified Applicants In The Hiring Process.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court addressed for the first time the constitutionality of one aspect of "political patronage." In *Elrod*, three employees in the Cook County Sheriff's Office had been fired and a fourth was in imminent danger of being fired "solely because they did not support and were not members of the Democratic Party, and had failed to obtain the sponsorship of one of its leaders." *Id.* at 351. The plaintiffs contended that this practice deprived them of rights guaranteed under the First and Fourteenth Amendments. *Id.* at 350. A closely divided Court held that nonpolicymaking, nonconfidential employees cannot be discharged or threatened with discharge solely because of their political affiliation or nonaffiliation. *Id.* at 375 (Stewart, J., concurring).[7]

In *Elrod*, it was undisputed that the plaintiffs were discharged *solely* because of their political affiliation or nonaffiliation. 427 U.S. at 350, 351, 375. The nature of the "political considerations" at issue in *Elrod* was simple, straightforward and unforgiving: employees either affiliated

[7] The Court reaffirmed *Elrod* in *Branti v. Finkel*, 445 U.S. 507 (1980), holding that an assistant public defender who is satisfactorily performing his job cannot be discharged solely because of his political beliefs. *Id.* at 517. Reformulating the policymaker exception recognized in *Elrod*, the Court found that a public employee's political affiliation or beliefs "cannot be the sole basis for depriving him of continued employment," *id.* at 516, unless the government agency can demonstrate that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518.

with or obtained the sponsorship of the Democratic Party or lost their jobs. *Id.* at 351. In light of the strict party requirement in that case, the plurality found substantial support for its ruling in *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U.S. 183 (1952); and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *See Elrod*, 427 U.S. at 357-58 (plurality opinion).[8]

The considerations challenged here are fundamentally different from the strict partisan practice condemned in *Elrod*. Here, there is no allegation that the State Officials' employment decisions are based solely on political affiliation. *See* Pet. App. C-11. Unlike *Elrod*, where the dismissals were dictated solely by reference to party affiliation, the considerations alleged in the complaint are not absolutely determinative of the hiring process and are not limited to affiliation with the Republican Party. (*See* R.A. 7, ¶ 11f.)

Thus, plaintiff Moore has not alleged that job recommendations are a prerequisite to be hired for a state job; nor are such recommendations alleged to be the exclusive province of the Republican Party. Instead, hiring decisions are alleged to be "substantially motivated" by considerations of friendship, politics and other personal relationships. These considerations include whether the applicant or employee is a relative or friend of a Republican (which presumably includes Democrats, Independents and persons not connected to any party). Thus, plaintiff Moore alleges that two of the three people hired instead of him were relatives of Republicans (R.A. 17, ¶ 23e); he does not allege that they were Republicans, or were not Democrats or Independents.

[8] In both *Wieman* and *Keyishian*, the Court recognized that political association could not, by itself, require or threaten the dismissal of a public employee. *See Elrod*, 427 U.S. at 358-59. In *Mitchell*, the Court posited a strict hypothetical singling out certain groups for adverse treatment solely on the basis of race, religion or political party affiliation.

Likewise, under the allegations of the complaint, these considerations include sponsorship by any member of the Illinois General Assembly (without regard to party affiliation) who is "deemed to be a friend or supporter of Defendant Thompson." (R.A. 7, ¶ 11f.) Plaintiffs do not allege in their complaint—nor could they—that Governor Thompson's "friends" and "supporters" are limited to members of the Republican Party.

Moreover, unlike *Elrod*, where employees were fired without any regard for their performance on the job, the employment practices alleged in the complaint are entirely consistent with the mandate of the Illinois Personnel Code.[9] Plaintiff Moore does not allege that the successful candidates for the job he sought were unqualified within the meaning of the Code, or even that he was more qualified than the applicants who were hired by the state.

[9] The Code, which establishes certain procedures to determine qualifications for state jobs, does not dictate which person or persons will be awarded a job (or transfer or promotion) from a pool of qualified candidates. The Code ensures only that candidates who are considered for positions have passed the appropriate examination. For example, in the hiring context, the Code provides for "open competitive examinations to test the relative fitness of applicants for the respective positions." *Ill. Rev. Stat.* ch. 127, ¶ 63b108b.1 (1985). The Code requires that successful candidates (*i.e.*, candidates who have passed the requisite examination) be placed on eligibility lists in order of their respective performance on the examination. *Id.* at ¶ 63b108b.3. The Code operates in similar fashion regarding promotions, transfers, and rehires. *E.g.*, *Id. at* ¶¶ 63b108b.2, 108b.11, 108b.12. State agencies may hire applicants from the appropriate eligibility list. *Id.* at ¶ 63b108b.5. Having established the prerequisites for qualification, the Code goes no further, affording state agencies the discretion to hire employees from among the Code-qualified candidates. Plaintiffs do not allege that defendants have hired, promoted, transferred or rehired any person not on the appropriate eligibility list.

The alleged "patronage system" which Moore attacks is nothing like the strict partisan test at issue in *Elrod*, or the loyalty oaths which were struck down in *Wieman* and *Keyishian*. Plaintiff Moore claims only that other qualified applicants were hired by the state based, in part, on a variety of factors that include family, friendships, politics and other connections. *(See* R.A. 17, ¶ 23e.) These hiring practices, which comport with the state Personnel Code, are not proscribed by the First Amendment.

The Court of Appeals for the Sixth Circuit upheld the consideration of politics, friendship and family relations in hiring public employees in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986). In *Avery*, the plaintiff alleged that her application for employment was not considered because she was unconnected with the defendants' "network" of friends, relatives or "friends or relatives of political allies." *Id.* at 234. The evidence in *Avery* demonstrated that the "network" had a strongly partisan character. During a period of nearly eight years, only 10 of the 432 persons hired by the defendants were Democrats. *Id.* at 235. One of the defendants in *Avery* explained this preference in plainly partisan terms: " ' [A]ll things being equal I prefer to have a Republican working for me because I assume that he would be more interested in taking part in helping me get re-elected.' " *Id.*

Rejecting the plaintiff's claim that *Elrod's* prohibition of political dismissals applies with equal force in the hiring context, the Sixth Circuit held that "elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." 786 F.2d at 234. Emphasizing that the hiring decision turned on a variety of factors, the Court distinguished the authorities upon which plaintiff Moore relies (*id.* at 237):

> "There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod*, *Branti*, *Keyishian*, *Mitchell* and *Wieman*, *supra*, and a patronage system that relies on family, friends and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes—finding good employees, maintaining and extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government."

Here, as in *Avery*, plaintiff Moore has alleged that decisions to hire state employees are based, in part, on a nonexclusive network of recommendations from a variety of sources. (R.A. 7, ¶ 11f.) Indeed, the allegations in this case portray an employment system far less restrictive than the system upheld by the Sixth Circuit in *Avery*.

In apparent recognition that there is no basis to extend the limited holding of *Elrod* to the dramatically different hiring practices alleged here, plaintiff Moore grossly mischaracterizes the nature of the alleged "patronage system." In the brief on the merits, plaintiff Moore claims that the State Officials have constructed an employment system in which "no Democrats or Independents or Republicans with political views differing from the incumbent administration shall be employed" by the State. (Pl. Br. 16.) That is not alleged anywhere in the complaint, nor could it be alleged consistent with Federal Rule of Civil Procedure 11. To the contrary, under the allegations of paragraph 11f of the complaint (R.A. 7), the challenged hiring system permits the hiring of, among others: (1) a Democratic friend of a member of the Illinois legislature who is a friend of Governor Thompson, (2) an

Independent friend or relative of a Republican, or (3) an apolitical friend of the Governor.

Elsewhere in the brief, plaintiff Moore argues that in order to get a job, he must vote in the Republican Party primary, work for the election of Republican candidates and contribute money to the Republican Party. (Pl. Br. 21.) This also is not alleged anywhere in the complaint. Plaintiff Moore also asserts in his brief that the State Officials "have used the employment system to coerce the merger of partisan loyalty with loyalty to the state. In essence, the [State Officials] require a loyalty oath in order to be . . . hired." (Pl. Br. 35.) This is rhetoric made from whole cloth; it is, as shown above, inconsistent with the allegations of the complaint.

By recasting the allegations of the complaint in this manner, plaintiff Moore apparently hopes to avail himself of this Court's decisions in *Branti*, *Elrod*, and *Keyishian*.[10] A careful examination of the complaint confirms that *Elrod* and the "loyalty oath" cases have no application here. As both courts below properly determined, there is a substantial difference between a strict employment system that excludes applicants on the basis of their beliefs, and plaintiff Moore's complaint that other qualified candidates were hired for the position he desired based, in part, on a panoply of considerations which are not limited to political belief. Pet. App. A-23 n.4; Pet. App. C-13. The kind of hiring system

[10] Plaintiff Moore is joined in the rewriting of the complaint by three of his amici, who take similar liberties in mischaracterizing the allegations in the complaint. *See, e.g.*, NEA Br. 4 (omitting any mention of the non-partisan components of the considerations allegedly used in the employment process); IVI Br. 3 (falsely asserting that non-Republicans are "excluded" from being hired "if they do not have the partisan support of the Republican Party officials"); NCF Br. 2 (erroneously stating that "[t]he pervasive patronage scheme in issue here employs the most strict political test as the threshold standard for the entire spectrum of employment decisions").

alleged here does not offend the letter or logic of this Court's ruling in *Elrod*.

B. The Burdens Imposed On The First Amendment Rights Of Applicants Who Fail To Obtain A Job Are Not Sufficient To State A Constitutional Claim.

The hiring practices alleged in the complaint are not only less partisan than the firings prohibited in *Elrod*, they also do not impose comparable burdens on the constitutional rights of affected applicants like Moore. In an opinion written by Justice Brennan, the three-Justice plurality in *Elrod* found that patronage practice runs afoul of the Constitution "to the extent it compels or restrains belief and association." 427 U.S. at 357. The plurality reasoned that dismissal or the threat of dismissal from existing employment "unquestionably inhibits protected belief and association" and "penalizes its exercise," and thus raises a constitutional issue. *Id.* at 359.

Because patronage dismissals "severely restrict political belief and association" (*id.* at 372), and represent a "severe encroachment on First Amendment freedoms" (*id.* at 373), the *Elrod* plurality considered whether there was adequate justification for this "unquestionable" effect. The plurality found that the interests proffered failed to justify the wholesale firings at issue in that case, and that patronage dismissals were not "the least restrictive alternative" to promote the democratic process. *Id.* at 369. Thus, the plurality concluded that the practice of wholesale firings based solely on partisan political reasons was prohibited by the First and Fourteenth Amendments. *Id.* at 373.

However, the *Elrod* plurality also recognized that a ban on all partisan political firings would undercut representative government by obstructing a new administration's implementation of its own policies. *Id.* at 367. For this reason, the plurality declined to go so far as to ban all such firings, and instead concluded that "[l]imiting patronage dismissals to

policymaking positions is sufficient to achieve this governmental end." *Id.*

The analysis employed by the plurality in *Elrod*—which focused on the burdens imposed on the constitutional rights of the affected employees—requires a different result in the hiring context at issue here. In this case, both the District Court and the Court of Appeals determined that any "chilling effect" on disappointed applicants who fail to get a particular job does not give rise to a constitutional claim. Pet. App. A-24; Pet. App. C-5. This determination correctly interprets the *Elrod* principle, and is consistent with more recent decisions of this Court examining the effects that various employment practices have on applicants and employees.[11]

[11] Two of plaintiffs' amici appear to concede that under *Elrod*, this Court must determine, as a threshold matter, whether the hiring practices alleged "significantly impair" First Amendment freedoms so as to require constitutional scrutiny. *See* IVI Br. 12 n.4 ("For constitutional purposes, the emphasis must be on the effect of the system on freedom of speech and association"); AFL Br. 11 (contending that First Amendment freedoms are "severely burdened" by the employment practices alleged). Relying on *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), plaintiffs and amicus NEA disagree with that approach; they contend that the extent of the burdens imposed on the First Amendment rights of the affected applicants and employees are irrelevant. *See Pl. Br. 22-23; see also* NEA Br. 3 (in balancing the interests of the employee and the state, as an employer, "the relative severity of the employment sanction that has been imposed . . . is not a factor to be weighed").

However, political patronage runs afoul of the Constitution "to the extent it compels or restrains belief and association." *Elrod*, 427 U.S. at 357 (plurality opinion). For this reason, plaintiffs and NEA err by leaping to a discussion of the relevant state interests without determining, at the outset, whether the burdens imposed on First Amendment freedoms are of constitutional magnitude. Their attempt to import the *Connick and Pickering* balancing tests should be rejected. The Court in *Connick* emphasized that in each of the precedents in which *Pickering* is rooted, the government employed the threat of discharge to prevent or "chill" public employees from joining political parties or other associations.

(footnote continued on following page)

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court struck down a school board's policy of affording minority teachers preferential protection from layoffs. Justice Powell's plurality opinion drew a sharp distinction between the effects which affirmative action plans have on incumbent employees and on individuals who seek to be hired. *Id.* at 282. The plurality observed that *"[d]enial of a future employment opportunity is not as intrusive as loss of an existing job."* *Id.* at 282-83 (emphasis added). The plurality explained that "[a] worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. . . . Layoffs disrupt these settled expectations in a way that general hiring goals do

[11] *continued*
Connick, 461 U.S. at 144-45. In *Pickering* itself, as in *Connick* and more recently in *Rankin v. McPherson*, 483 U.S. 378, 379-80 (1987), this Court reviewed the *discharge* of a public employee in retaliation for the exercise of speech. *Pickering*, 391 U.S. at 574; *Connick*, 461 U.S. at 141. Thus, the effect on First Amendment rights underlying *Elrod* was present in each of those cases.

By contrast, in this case, there is no allegation that an employee has been discharged, threatened with discharge, or punished in retaliation for the exercise of protected speech or association. Plaintiffs here complain that other employees received more favorable treatment from their public employer on the basis of friendship, politics and the like. Neither *Connick* nor *Rankin* supports a departure from the *Elrod* analysis, which requires examination of the competing interests of the government and employee if there is found to be a significant effect on the First Amendment rights of the individual employee. *See Agosto De Feliciano v. Aponte Roque*, No. 86-1300, Slip. Op. at 13 (1st Cir. December 8, 1989)(*en banc*). *See also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 235 (1986) (Scalia, J., dissenting) (citation omitted) (" '[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights'; one must 'look closely at the nature of the intrusion . . . to see whether we are presented with a real limitation on First Amendment freedoms.' ")

not." *Id.* at 283.[12] *See also Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616, 638 (1987) ("denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioners"); *United States v. Paradise*, 480 U.S. 149, 183 (1987) (citation omitted) (" 'Denial of a future employment opportunity is not as intrusive as loss of an existing job,' and plainly postponement imposes a lesser burden still.")

Although *Wygant* involved a challenge under the Equal Protection Clause of the Fourteenth Amendment, the Court's observations as to the burdens imposed on the constitutional rights of the affected teachers are directly relevant to the issue here. *Wygant* reflects the Court's common sense determination that employment practices short of dismissal (or layoff) do not have the severe practical consequences that are attendant to the loss of a job. This determination is entirely consistent with the principle underlying *Elrod*, in which the Court reviewed the challenged firing practice in light of the burdens it imposed on the constitutional rights of the affected employees. This also is the analysis applied by the Seventh Circuit in this case, which held that plaintiff Moore's failure

[12] In a concurring opinion, Justice White suggested agreement with this distinction (id. at 295) (White, J., concurring): "Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks . . . is quite a different matter"). In a dissent joined by Justices Brennan and Blackmun, Justice Marshall similarly characterized the school board's hiring policies as "less severe" than the use of layoffs to increase minority employment. *Id.* at 309. Justice O'Connor expressed no view on the matter. Only Justice Stevens, in his dissenting opinion (*id.* at 319 n.14), rejected this distinction.

to obtain a job was not actionable under the First Amendment.[13]

As this Court has recognized in *Wygant* and other cases, the Seventh Circuit observed that the burden imposed by a failure to obtain a particular position "is much less significant than losing a job." Pet. App. A-18. The Seventh Circuit explained (*id.* at A-19):

> "[A]n applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment at one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income."

Finding that use of the considerations alleged in this case fails to have the same effect as did the solely partisan dismissals of existing employees in *Elrod*, the Seventh Circuit

[13] In his brief, plaintiff Moore suggests that as a result of his failure to obtain a state job, he might have to contribute money to or volunteer to work for the Republican Party in alleged derogation of his ideals. (*See* Pl. Br. 31-32.) We previously demonstrated that in contrast to the arguments presented in the brief, the complaint does not allege that such partisan support is required to obtain a job with the state. (*See* pages 9-10, 19-20, *supra*.) Likewise, the complaint does not allege *any* effect on Moore's political views or activities, much less the effect that is suggested in the brief. More importantly, in fashioning a categorical rule of constitutional law, this Court in *Elrod* did not carve out an exception for the hearty employee who would not be deterred from political expression by the threatened loss of a job. So too in this context, the Court should not base its ruling on the hypothetical effects on a hypothetical plaintiff who might abandon his political beliefs if he does not obtain a job with the state.

correctly affirmed the dismissal of the hiring claim without proceeding to the next stage of the constitutional analysis.[14]

The Seventh Circuit's holding that elected officials may consider political factors in hiring public employees also is consistent with *Messer v. Curci*, 610 F. Supp. 179 (E.D. Ky. 1985), *aff'd*, 881 F.2d 219 (6th Cir. 1989) (en banc), *cert. pending*, No. 89-5849, and *Avery v. Jennings*, 786 F.2d 233, the only other appellate decisions on this issue.

In *Messer*, two seasonal workers challenged the decision of the Kentucky Department of Parks not to rehire them as seasonal workers. 610 F. Supp. at 180. The plaintiffs claimed that the defendants refused to hire them solely because of their political beliefs and their failure to work for the election of the then-Governor of the State of Kentucky. *Id.* at 181. The District Court, treating the employment decision as a failure to hire, found that *Elrod* and its progeny failed to support the plaintiffs' claims, and dismissed the complaint. *Id.* at 183-84.

On appeal, the Sixth Circuit affirmed dismissal of the complaint, holding that it is not constitutionally impermissi-

[14] The Seventh Circuit's decision on political hiring is consistent with and derives from its prior opinion in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). In *LaFalce*, the Seventh Circuit affirmed the District Court's dismissal of a complaint in which a contractor alleged he had been improperly denied a public contract based upon political considerations. The *LaFalce* Court reasoned that *Elrod's* prohibition of political firings is based on the principle "that public employees would be discouraged from expressing their true political views if it might cost them their jobs." *Id.* at 293. In rejecting the plaintiff's claim that unsuccessful contractors would similarly be discouraged, the Court of Appeals found the "extent of the likely interference" with First Amendment rights insufficient to raise constitutional concerns, and the wisdom of a constitutional ruling forbidding the use of political considerations in this context dubious at best. *Id.* at 294. *Accord Horn v. Kean*, 593 F. Supp. 1298 (D.N.J. 1984), *aff'd*, 796 F.2d 668 (3d Cir. 1986) (en banc).

ble "for an elected official to implement a preference for political supporters in government employment where not otherwise controlled by statute." 831 F.2d at 223. The Court in *Messer* emphasized that "[t]here are a number of distinctions, of considerable practical importance, between the first amendment costs of patronage firing of existing workers, and patronage hiring." *Id.* at 222. Among the controlling differences cited by the Court were the minimal burdens that a hiring system imposes on the constitutional rights of the affected applicants.

The Sixth Circuit further explained (*id.* at 223, citation omitted):

> "As noted in *Wygant*, the pain to the individual from a certainty of loss of existing employment is much greater than the loss of some possibility of employment in one of a number of possible employment opportunities. On the other hand, the potential advantage to an effective and vigorous government of choosing sympathetic and enthusiastic employees is much greater than the gain from dismissal of existing employees who are, by explicit hypothesis, performing satisfactorily. . . ."[15]

The Sixth Circuit's *en banc* decision in *Messer* builds upon its earlier decision in *Avery v. Jennings*, *supra*. In

[15] In upholding the hiring practice at issue in that case, the Sixth Circuit in *Messer* went farther than this Court needs to travel in this case. Plaintiff Moore has not alleged that applicants are denied employment with the State of Illinois solely because of their political affiliation. Instead, as we demonstrated in Part I A, *supra*, plaintiff Moore alleges only that the State Officials' hiring practices are "substantially motivated" by a myriad of "political considerations" that are not limited to political affiliation or partisan political matters. Under these circumstances, there is no basis for a constitutional claim. As the First Circuit observed in *Estrada-Adorno v. Gonzalez*, 861 F.2d 304, 305 (1st Cir. 1988) (emphasis in original): "[W]e have found no federal case holding that it violates the federal Constitution to use political criteria for *hiring* state employees, even in circumstances where it might violate the federal [C]onstitution to *dismiss* them for political reasons."

Avery, the Sixth Circuit held that "elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." 786 F.2d at 234. Rejecting the plaintiff's claim that *Elrod's* prohibition of political dismissals applies with equal force in the hiring context, the Court of Appeals reasoned that "[a]lthough the informal hiring practices in question here place some burden on the associational rights of prospective job applicants, that burden does not rise to the level of a constitutional deprivation." *Id.* at 236.[16]

[16] In contrast to *Messer* and *Avery*, the cases upon which plaintiff Moore relies did not involve, much less resolve, the hiring claim alleged in this complaint. In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff claimed that his existing employment status with the Library of Congress was affected adversely by an FBI investigation "based solely on the exercise of his associational rights resulting in concrete harms to his reputation and employment opportunities." *Id.* at 93.

In *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977), plaintiffs alleged that they were compelled to contribute part of their salaries to the county committee of the Republican Party to obtain a promotion. *Id.* at 550. In contrast to *Cullen*, it was not (and could not have been) alleged in this case that plaintiffs were forced to make financial contributions to the Republican Party. Indeed, while plaintiffs attach to their complaint a questionnaire allegedly used in promotions—not hiring—that seeks information about the willingness of qualified applicants for promotion to contribute time or money to support the Republican Party, it is not alleged that applicants must fill out the questionnaire, perform work, or contribute money to the Republican Party in order to be promoted. (*See* Pet. App. C-2.)

The Third Circuit has acknowledged that its suggestion in *Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3d Cir.), *cert. denied*, 434 U.S. 892 (1977), that a state may not condition hiring on political factors, was "pure dicta" and not controlling. *Mazus v. Department of Transportation*, 629 F.2d 870, 873 (3d Cir. 1980). The only other case cited, *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983), involved the right to privacy and "appellant's interest in family living arrangements, procreation and marriage." It is simply irrelevant to the issues raised in this case.

In *Elrod*, this Court imposed the first constitutional limit on the historic practice of political patronage. Finding that the partisan dismissal of public employees inhibits First Amendment rights and penalizes their exercise, the Court curtailed—but did not entirely forbid—the practice. *Elrod*, 427 U.S. at 375 (concurring opinion). In subsequent decisions, the Court has recognized that dismissals from employment have a far greater impact on individuals than do other types of employment practices, for example, hiring, in which no vested interests or settled expectations exist.

Based on this analysis, the only courts of appeals to have addressed this issue, including the Seventh Circuit in this case, have found that the difference between losing an existing job and failing to obtain one is substantial, and dispositive for constitutional purposes. Neither *Elrod* nor its progeny justify extension of the ban on patronage firing to the very different hiring practices alleged in the complaint. Because the burdens imposed on the constitutional rights of plaintiff Moore are not comparable to the loss of a job, and because the "political considerations" alleged here differ markedly from the solely partisan firing practice proscribed in *Elrod*, the Seventh Circuit correctly upheld the dismissal of plaintiff Moore's claim.[17]

[17] This Court's decision in *Perry v. Sindermann*, 408 U.S. 593 (1972), is clearly distinguishable on both of these grounds. In *Perry*, the plaintiff alleged that the college's decision not to retain him (after ten years of employment) was based on his public criticism of the college administration. *Id.* at 595. The Court's analysis was premised on the plaintiff's allegations that the college had a *de facto* tenure program and that he had tenure under that program. *Id.* at 600-01. Thus, the actual holding of the Court (*id.* at 596)—that the plaintiff's lack of a contractual right to reemployment did not, standing alone, defeat his First Amendment claim—is not inconsistent with the Court of Appeals' decision affirming dismissal of the hiring claim here. Even if *Perry* is not considered a strict firing case, which we believe it is, the college's decision clearly disrupted the plaintiff's settled expectations that he would continue in his job. Moreover, the language in *Perry*

(footnote continued on following page)

II.

CONSIDERATION OF FRIENDSHIPS AND POLITICS IN GRANTING FAVORABLE TREATMENT TO QUALIFIED PUBLIC EMPLOYEES DOES NOT STATE A FIRST AMENDMENT CLAIM.

Plaintiffs Rutan, Taylor, Standefer and O'Brien, who admittedly have not been punished in any way because of their political beliefs or activities, nonetheless attempt to state a constitutional claim because they allegedly failed to obtain a promotion, transfer, or rehire as a result of the considerations of friendship and politics described in the complaint. In this case, the Seventh Circuit extended *Elrod* to protect employees from patronage practices short of dismissal "that may, as a practical matter, impose the same burden as outright termination." Pet. App. A-17. The Court of Appeals remanded the employees' claims for a determination whether the particular employment actions complained of were "the substantial equivalent of a dismissal." *Id.* at A-25.

We previously have demonstrated that there is a substantial and constitutionally significant difference between burdens imposed on individuals who are dismissed from existing employment and on applicants who fail to obtain a job. *See* pages 21-29, *supra*. We also have demonstrated that the complaint alleges an employment system that is far less restrictive than the strict partisan system of wholesale firings

---

[17] *continued*

upon which plaintiffs principally rely (*id.* at 597), and the cases cited therein, merely reflect the long-established principle that the state may not punish employees solely for the exercise of protected speech. The decision not to retain Mr. Perry was direct punishment for his exercise of speech and thus ran afoul of this principle.

Plaintiff Moore does not and cannot make either allegation critical to *Perry*: he does not claim that he was punished—in any way, directly or indirectly—for exercising his First Amendment rights; nor does he allege that his failure to obtain a job disrupted any settled expectations and thus burdened his First Amendment rights.

prohibited in *Elrod*. See pages 9-10, 19-20, *supra*. In Section A, below, we demonstrate that these factors also require dismissal of the claims of the employees. Plaintiffs Rutan, Taylor, Standefer and O'Brien have not been adversely affected in their employment status by the use of the considerations alleged in the complaint.

In Section B, we demonstrate that the employees' claims in this case properly cannot be equated with cases involving the imposition of punitive employment sanctions in retaliation for the exercise of protected speech. The chilling effect underlying *Elrod* simply does not exist in the absence of punitive sanctions, or some other employment practice which adversely affects the terms and conditions of an employee's job. Thus, the Seventh Circuit correctly observed that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." Pet. App. A-23 n.4. The Court of Appeals erred, however, in failing to give full effect to its observation. The allegations of the employees do not give rise to a constitutional claim, and were correctly dismissed by the District Court.

A. The Alleged Denials Of Promotion, Transfer And Rehire Do Not Affect First Amendment Rights Sufficiently To Raise A Constitutional Issue.

This Court's ruling in *Elrod* was premised on the finding that political firings represent a "severe encroachment on First Amendment freedoms." *Elrod*, 427 U.S. at 373 (plurality opinion). Because the severe employment sanctions proscribed in that case inhibited protected belief and association and penalized their exercise, the plurality found a constitutional issue requiring a balance of the competing state interests. *Id.* at 362.

The allegations of the employees in this case are vastly different from the claims presented in *Elrod*. There is no allegation here that any state employee has been discharged,

or threatened with discharge, with the concomitant disruption of settled expectations. There is no allegation that the State Officials employ a strict political test as the sole basis for employment decisions. Rather, the employees here allege that a "substantial" factor in such decisions are an array of considerations which include recommendations from family or friends of Republicans. (R.A. 7, ¶ 11f.) Likewise, there is no allegation here that the employees have been punished for their political beliefs. Rather, it is alleged only that they "did not receive some favorable employment decisions" as an indirect effect of the considerations of friendship, politics and other relationships. Pet. App. A-8, 23 n.4; Pet. App. C-11, 13. The District Court correctly recognized that these distinctions were critical under the *Elrod* analysis, and required the dismissal of all of the employees' claims. Pet. App. C-5.

The Seventh Circuit recognized that promotion, transfer and rehire decisions are "significantly less coercive and disruptive than discharges." Pet. App. A-19. Nonetheless, the Seventh Circuit remanded the employees' claims on the rationale that those claims could raise a constitutional issue if it were demonstrated that the effect of the denial of promotion, transfer or rehire was to "impose the same burden as outright termination." Pet. App. A-17.

A remand for this determination is unnecessary. Plaintiffs Rutan and Taylor do not claim that their failure to be promoted or transferred resulted in the loss of their jobs, or in any way adversely affected the terms of their employment. Nor do Rutan and Taylor claim that they permanently are barred from receiving the promotions or transfers which they sought. Instead, they challenge the decision of the State Officials to promote another qualified employee or to deny a desired transfer, allegedly based, in part, on considerations of politics and/or friendship.

As a matter of law, this failure to obtain a desired promotion or transfer does not disrupt settled expectations

in a manner comparable to a discharge decision. In *Wygant v. Jackson Board of Education*, 476 U.S. at 282-83, this Court recognized that denial of a future employment opportunity is not as intrusive as the loss of a job. In subsequent decisions, the Court has confirmed that the burdens imposed on the rights of existing employees under circumstances similar to those here do not have the same profound effect as a termination of employment.

In *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), a qualified male employee filed suit challenging the defendant's decision, taken pursuant to an affirmative action plan, to promote a qualified woman to the position of road dispatcher, based, in part, on her sex. *Id.* at 619. Upholding the validity of the affirmative action plan, the Court found that the challenged practice did not unduly affect the terms and conditions of the plaintiff's employment. The Court explained (*id.* at 638):

> "[P]etitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions."

The same can be said of plaintiffs Rutan and Taylor. Plaintiffs Rutan and Taylor had no "firmly rooted" expectation or "absolute entitlement" to the promotions they desired. They continue to work for the State of Illinois "at the same salary and with the same seniority, and remain[ ] eligible for other promotions." *Id.* *Johnson* confirms that failing to receive a promotion does not carry the same practical consequences that are attendant upon a discharge. It also supports the conclusion that *Elrod*, which is premised on a severe encroachment on constitutional rights, does not apply to the

allegations raised here.[18] As a result, the Seventh Circuit should have affirmed the dismissal of the promotion and transfer claims.[19]

A remand also is unnecessary to determine that the rehiring allegations of plaintiffs Standefer and O'Brien do not state a constitutional claim. As the Seventh Circuit recognized, these claims are even "more straightforward" than the promotion and transfer claims. Pet. App. A-27. Plaintiffs Standefer and O'Brien do not allege that their layoffs were in any way motivated by political considerations. Nor do they claim that they had any specific right to recall or rehire.

Based on their own allegations, plaintiffs Standefer and O'Brien stood in the position of new applicants for employment, with no pre-existing right to obtain a job. *See Rice v.*

[18] In *United States v. Paradise*, 480 U.S. 149 (1987), a four-Justice plurality applied the same analysis to uphold a District Court's order that at least 50% of the Alabama state troopers promoted to corporal must be black. In an opinion written by Justice Brennan, the plurality observed (480 U.S. at 182-83, citations omitted): "The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose burdens of the sort that concerned the plurality in *Wygant*. . . . Consequently, like a hiring goal, it 'impose[s] a diffuse burden, . . . foreclosing only one of several opportunities.' 'Denial of a future employment opportunity is not as intrusive as loss of an existing job,' and plainly postponement imposes a lesser burden still."

[19] The Sixth Circuit recently reached this result in *Rice v. Ohio Department of Transportation*, 887 F.2d 716 (6th Cir. 1989), *cert. pending*, No. 89-761. In *Rice*, the plaintiff alleged that the defendants' consideration of political factors in declining to promote him violated the First Amendment. *Id.* at 719. Upholding the District Court's dismissal of the claim, the Court of Appeals explained (*id.*): "We see no meaningful distinction, in the present context, between a failure to promote and a failure to hire or rehire. Assuming Mr. Rice's allegations of political motivation are correct, the defendants' decision not to promote Mr. Rice was the product of precisely the sort of 'preference for political supporters in government employment' that we found constitutionally permissible in *Messer*."

Ohio Department of Transportation, 887 F.2d at 719 (finding no difference, under the First Amendment, between a failure to hire and failure to rehire); *Messer v. Curci*, 881 F.2d at 221 (plaintiffs treated as applicants where they had no continuing employment status under state law and were not employed at the time of the contested decision). As with the hiring claim of plaintiff Moore, any conceivable burden on the First Amendment interests of plaintiffs Standefer and O'Brien as a result of their failure to obtain a position "is much less significant than losing a job." Pet. App. A-18.

Facing an issue far different from the one raised by the complaint in this case, the First Circuit recently held that punitive employment actions short of dismissal that are based solely on political affiliation may state a First Amendment claim only if, *inter alia*, a plaintiff establishes by clear and convincing evidence that "the employer's challenged actions result[ed] in a work situation 'unreasonably inferior' to the norm for the position." *Agosto De Feliciano v. Aponte Roque*, No. 86-1300, Slip Op. at 18 (1st Cir. December 8, 1989) (en banc). In fashioning this standard, the First Circuit embraced the analysis of the burdens on First Amendment rights required by *Elrod* and applied by the Courts below and by the Sixth Circuit in *Avery* and *Messer*. *See* Slip Op. at 13 (adopting a "categorical cutoff point of severity below which actions simply should not be considered a constitutionally significant burden"). The First Circuit reasoned that not every adverse employment action creates a First Amendment claim (*id.* at 15): "[I]nsubstantial changes in an employee's work conditions and responsibilities, even when politically motivated, either would not reasonably chill the employee's exercise of the right to free p..itical association, or would cause a level of burden that is almost certainly outweighed by the government's need to protect its own interest in implementing new policies."

In this case, plaintiffs' "work conditions" have not changed at all. Quite the contrary, the fact that their work

conditions have not changed for the better is the sole basis for their complaint. Thus, while the test in *Agosto* is designed to govern a situation not presented here—the imposition of adverse employment actions based solely upon political affiliation—the First Circuit's recognition that not all such decisions rise to the level of a constitutional deprivation strongly supports dismissal of the employees' claims here.

B. The Employees Were Not Punished For The Exercise Of Protected Belief Or Association.

In contrast to *Elrod*, *Branti* and *Perry*, the principal cases upon which plaintiffs rely, this case does not involve allegations that public employees have been punished for the exercise of protected speech. Plaintiffs Rutan, Taylor, Standefer and O'Brien assert only that other qualified employees received jobs, promotions, or transfers which they themselves desired. (*E.g.* R.A. 19, ¶ 19g.) This distinction was critical to the Seventh Circuit, which emphasized that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." Pet. App. A-23 n.4.

The principal concern underlying *Elrod*—preventing elected officials from using discharge or the threat of discharge to chill the exercise of protected belief and association by public employees—is not implicated by the use of the kinds of considerations involved in this case. In contrast to the directly punitive nature of the discharges curtailed in *Elrod* (*i.e.*, employees were fired solely if they failed to join the Democratic Party), the employees in this case complain that other qualified candidates were favored because of political or personal connections.

There is no claim in this case that plaintiffs were reprimanded, harassed or punished for political belief. Nor is there any allegation that the state employees who were promoted or rehired failed to perform their responsibilities, or to render necessary service, to the state. There is a significant difference

between an employment system which uses a strict political test "designed to call attention to political differences and punish those who differ," and a system like that alleged here, which may favor certain employees by taking into account many factors, including recommendations from family, friends and political allies. Pet. App. A-23 n.4; *Avery*, 786 F.2d at 236.

The employees (and NEA) incorrectly rely on a line of decisions—including prior decisions of the Seventh Circuit—which involved the imposition of punitive employment sanctions in retaliation for the exercise of protected speech. Plaintiffs are wrong in asserting that the Seventh Circuit's decision in the case is "an aberration," and abandons that Court's "outstanding record in protecting public employees' First Amendment Rights." (Pl. Br. 22-23.) In each of the decisions upon which the employees rely (Pl. Br. 23), the plaintiffs suffered punitive employment actions in direct retaliation for protected expression.[20]

Here, in contrast, there is no allegation that the employees have been demoted, transferred, harassed, reprimanded or punished in any way for their political beliefs. The distinction drawn by the Seventh Circuit in this case is a

---

[20] *E.g.*, *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir.), *cert denied*, 474 U.S. 803 (1985) (teacher given negative evaluations, removed as athletic coach and transferred as a result of speech on matter of public concern); *Egger v. Phillips*, 710 F.2d 292 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983) (former FBI agent involuntarily transferred and ultimately discharged after he alleged that other bureau personnel had engaged in wrongful conduct); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (plaintiff subjected to a pattern of harassment and ridicule in retaliation for her campaign for public office); *McGill v. Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (teacher involuntarily transferred in retaliation for expressing a complaint on school policy); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (police officer reprimanded for violating rule prohibiting employees from engaging in discussion "derogatory to the department").

meaningful one, as it demonstrated more recently in *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). In *Pieczynski*, the Court of Appeals upheld a jury verdict in favor of an employee who had been subjected to a pattern of harassment because of her political alliance with an opponent of the then-Mayor of Chicago. Harmonizing the precedents upon which plaintiffs rely, the Court reiterated a critical distinction underlying this case (875 F.2d at 1333-34): "It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees."

In light of this significant difference, *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), and numerous other decisions of the Courts of Appeals, do not control or even address the issue presented by this case. In *Bennis*, the plaintiffs alleged that they had been demoted in retaliation for their support of the Mayor's political opponent. The Third Circuit's opinion in *Bennis*, from which the employees quote at length (Pl. Br. 24), is on its face limited to the imposition of employment sanctions or "any *disciplinary action* for the exercise of permissible free speech." *Id.* at 731 (emphasis added). Here, it is not alleged and cannot seriously be contended that the employees have been disciplined, or that punitive sanctions have been imposed by their public employer.[21]

[21] This critical distinction renders inapposite the other decisions upon which the employees and NEA principally rely. In *Robb v. City of Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984), the plaintiff was transferred from his position as manager of an outdoor amphitheater to a job as a playground supervisor in retaliation for his union activities and refusal to settle a private lawsuit. In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the sole issue before the court was whether a policeman may be demoted for "intemperately criticizing the police chief in front of another police officer while off duty." *Id.* at 834. In *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), the plaintiff contended that he had been reassigned and transferred for political reasons to a less desirable

(footnote continued on following page)

Each of these cases is distinguished by a central allegation conspicuously absent from the complaint here: the plaintiffs suffered some concrete measure of retaliation (which disrupted their "settled expectations") as a direct result of protected expression. In contrast, this case does not involve allegations of punishment or retribution for political beliefs, but rather, the disappointment of plaintiffs Rutan, Taylor, Standefer and O'Brien that other employees received promotions, transfers or positions which these plaintiffs desired. The employees' disappointment is not actionable under the First Amendment.[22]

[21] *continued*
position in another region of the country. In *Lieberman v. Reisman*, 857 F.2d 896, 898 (2d Cir. 1988), the plaintiff alleged that her demands for payment relating to compensatory time and vacation time were denied solely because of her political affiliation. *See also Agosto De Feliciano*, Slip. Op. at 5 (alleging a "drastic change and reduction of [plaintiffs'] duties").

[22] If this Court disagrees, and determines that any of the employees has stated a constitutional claim, we submit—in the alternative—that the Seventh Circuit properly placed the burden on the employee to prove that the failure to obtain a desired promotion, transfer or rehire imposed "the same burden as outright termination." Pet. App. A-17. This test, derived from the Fourth Circuit's decision in *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), strikes an appropriate balance for three principal reasons. First, the *Delong* analysis properly accounts for this Court's limited holding in *Elrod* and recognizes that there is serious question as to the wisdom of further extending the reach of that decision. Pet. App. A-17. Second, substantial differences exist between dismissals, which can disrupt settled expectations, and the employment practices alleged in the complaint. *Id.* Third, *Delong* avoids the significant intrusion of federal courts that would result from extending *Elrod* beyond the "substantial equivalent of dismissal," while at the same time providing a remedy for an employee who can demonstrate that his or her failure to obtain a desired promotion, transfer or rehire imposes the same burden on First Amendment rights as would the employee's outright termination. *Id.* at A-17-18.

In contrast to *Delong*, the Third Circuit has extended *Elrod* to prohibit the "imposition of any disciplinary action for the exercise of permissible free speech." *Bennis v. Gable*, 823 F.2d at

(footnote continued on following page)

III.

STRONG PRUDENTIAL CONSIDERATIONS COUNSEL AGAINST ATTEMPTING TO PURGE FRIENDSHIP AND POLITICS FROM THE PERSONNEL PRACTICES OF STATE AND LOCAL GOVERNMENTS.

At bottom, plaintiffs' claims in this case are reduced to the accusation that they, rather than some other Code-qualified candidates, should have been hired, promoted, transferred or rehired by the State of Illinois. Strong prudential considerations, as well as the foregoing constitutional principles, confirm that federal courts are not the proper forum to assert these claims.

This Court recognized in *Bishop v. Wood*, 426 U.S. 341, 349 (1976), that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *See also Connick v. Myers*, 461 U.S. at 143 (emphasizing the "common-sense realization that government offices could not function if every employment decision became a constitutional matter"). More recently, in *Rankin v. McPherson*, 483 U.S. 378 (1987), this Court recognized that "public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Id.* at 384 (emphasis in original).

---

[*] *continued*

731. We previously demonstrated that the *Bennis* standard does not apply to the allegations stated here because no employees have been disciplined or punished for the exercise of free speech. (*See* pages 36-39, *supra*.) In any event, the Third Circuit's approach is flawed because it represents an unwarranted extension of *Elrod*. Under *Bennis*, it appears that any employee who perceives a slight on the job may state a constitutional claim, without any consideration of the burdens allegedly imposed on his or her constitutional rights.

While each of these admonitions arose in the context of a different constitutional claim, they are particularly apt in this case for two principal reasons: (1) the potential disruption with state and local government which would result from extending *Elrod* to the vastly different practices alleged here; and (2) the absence of any consensus (even among the courts) that friendship and politics should be purged from all contexts of public employment.

Interference with state and local governmental operations will be increased dramatically if *Elrod* is extended to cover all applicants for employment and all existing employees who fail to receive a desired promotion, transfer or rehire. There already are some 60,000 persons employed statewide in Illinois who would be implicated by a decision upholding the claims urged by plaintiffs here. There are thousands more who have applied and will apply for a job with the state. Unlike firing decisions, which are more limited in number, tens of thousands of decisions are made annually concerning hiring, promotion, transfer and rehire. Moreover, unlike the typical discharge situation, in which one employee has been fired, dozens of disappointed applicants might each file a federal suit alleging that they were not hired as a result of politics, friendship and family connections.

Plaintiffs nonetheless ask this Court to proceed down this path, apparently contending that everyday personnel decisions throughout the State of Illinois—and throughout every other state—properly should become a "constitutional matter" supervised by a federal judge. Plaintiffs' position is rigid and absolute: considerations of friendship and politics may *never* be taken into account in the vast majority of personnel decisions made daily by public offices nationwide.

The Seventh Circuit properly declined plaintiffs' invitation to "constitutionalize civil service and then preside over the system." Pet. App. A-22. Rejecting plaintiffs' demand that such considerations be purged from the employment process, the Court of Appeals explained (*id.*):

> "Recognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision. We doubt that there is a single disappointed employee who could not point to political disagreement, or simply lack of agreement between himself and a hiring official or the person who received the desired position. Political issues and beliefs do not come in neat packages wrapped 'Democratic' and 'Republican.' A wide variety of issues, interests, factions, parties, and personalities shape political debate. Moreover, it is questionable whether 'politics' could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals."[23]

The suggestion that federal courts can and should scrutinize the motives of elected state and local officials when they hire, promote and transfer public employees far exceeds this court's narrow ruling in *Elrod*. The principle that public officials cannot fire nonpolicymaking employees solely on the basis of their political affiliation does not support, much less mandate, replacing the Personnel Code adopted by the State of Illinois. The Illinois General Assembly has chosen not to prohibit public officials from preferring one qualified applicant over another on the basis of the considerations alleged in the complaint. To interpret *Elrod* to require such a system unwisely expands the reach of that decision beyond the limits of its history, *see* B. Cardozo, *The Nature of the Judicial Process*, 51 (1921), and imposes unrealistic burdens on federal

[23] *See also Agosto De Feliciano*, Slip Op. at 15 (recognizing substantial government interest, itself founded in the First Amendment, in implementing the policies of the new administration); *Avery*, 786 F.2d at 237 (extending *Elrod* "would require abolition of the hiring systems for office workers in thousands of legislative, executive, and judicial offices across the country . . . [and] the courts would have to constitutionalize a civil service system and oversee its operation"); *LaFalce*, 712 F.2d at 294 ("[A] decision upholding a First Amendment right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit").

courts to supervise the personnel practices of state and local governments. As Judge Cudahy recognized in his concurring opinion in this case (Pet. App. A-32): "[R]emoving politics from the dispensation of government jobs is too daunting a task even for such all-purpose problem-solvers as the federal courts." *See also LaFalce v. Houston*, 712 F.2d at 294 ("To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, other as quixotic, still others as undemocratic, but all as formidable").

These observations have particular force in light of this Court's recognition in *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987), that choosing the "most qualified" employee is not an exact science, but a very human and therefore subjective endeavor (*id.* at 641 n.17, citation omitted):

> " '[I]t is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.' "

It is undoubtedly true that these prudential considerations, forceful as they are, must yield to constitutional principle in an appropriate case. Here, however, far from facing the moral imperative that culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954), there is no consensus

that considerations of friendship and politics must be purged from all contexts of public employment.[24]

Thus, the attempt by plaintiffs and their amici to equate the considerations at issue here with discrimination on the basis of race (*see, e.g.*, Pl. Br. 37-39) and religious belief (NEA Br. at 7n.4)) ignores the substantial differences embedded in our history, culture and law between race or religious discrimination and the so-called "political discrimination."

[24] Indeed, the unique and often salutary role of patronage in America politics has led some courts, while compelled to follow the ban on political dismissals, to urge the Court to reconsider *Elrod*. *See, e.g., Loughney v. Hickey*, 635 F.2d 1063, 1071 (3d Cir. 1980) (Aldisert, J., concurring) ("The first amendment is regarded properly as a shield protecting fundamental rights of individuals against government excess or tyranny of the majority. It is quite another thing to use it as a sword to cut out the heart of the basic processes that form our tradition of self-government. In my view, that is exactly what the Supreme Court has done here"); *Whited v. Fields*, 581 F. Supp. 1444, 1452 (W.D. Va. 1984) ("This court disagrees with the *Elrod-Branti* rule both from a standpoint of logic and justice.... We have become a government of the people by the people for the bureaucracy. The only result of the *Elrod* and *Branti* decisions is to simply freeze into public employment people whom the electorate have rejected"); *Visser v. Magnarelli*, 530 F. Supp. 1165, 1175 (N.D.N.Y. 1982) ("It is to be hoped that in light of the inadequate attention paid to patronage's benefits in the Supreme Court's balancing test... the Supreme Court will reconsider the wisdom of its two decisions"). *See also Elrod*, 427 U.S. at 379 (Powell, J., dissenting) (*citing* C. Fish, *The Civil Service and the Patronage*, 156-57 (1905); Sorauf, *Patronage and Party*, 3 Midwest J. Pol. Sci. 115-16 (1959)); *Moeller, The Supreme Court's Quest for Fair Politics*, 1 Const. Comm. 203, 213-17 (1984).

The case before the Court raises only the question of whether the principle of *Elrod* requires a ban on considerations of friendship and politics as a factor in employment decisions other than discharge or discipline. Resolution of this question in favor of the defendants in this case does not involve reconsideration of *Elrod* itself.

The principle of religious freedom is deeply enshrined in our social and political culture, dating back to the arrival of the pilgrims at Plymouth Rock. This principle is embodied in the First Amendment. Our national commitment to racial nondiscrimination is, regrettably, of more recent vintage. It took a Civil War, more amendments to the Constitution, and an evolution of our society to arrive at our present commitment to racial freedom and equality. *See* Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv L. Rev. 1 (1987). *See also* Sullivan, *Book Review*, 32 Am. J. Leg. Hist. 179-82 (1988). But now, that commitment is of the same stature constitutionally as religious freedom.

The same simply does not hold true for "political" discrimination. The political leaders who viewed the First Amendment as a charter of religious liberty saw no tension between that Amendment and the use of politics and friendship in the dispensing of public jobs. The *Elrod* plurality noted that patronage has existed "at least since the Presidency of Thomas Jefferson," 427 U.S. at 353; Justice Powell's dissenting opinion traced the practice back to the administration of George Washington. *Id.* at 378 (Powell, J., dissenting). In that time, the exercise of politics and friendship was raw, and often ignored merit.

Over the years, governments at all levels have adopted merit principles which help ensure that government work is performed by qualified people. However, unlike discrimination based on religion or race, discrimination among qualified applicants on the basis of friendship or politics never has been—and is not now—inconsistent with constitutional doctrine or our conception of American government and society. In the absence of any consensus that the use of such considerations is intrinsically wrong, the Court should resist imposing upon state and local governments a constitutionalized civil service system.

CONCLUSION

For the foregoing reasons, the State Officials respectfully request that this Court affirm in part and reverse in part the decision of the Seventh Circuit, and reinstate the District Court's judgment dismissing the complaint in its entirety.

Respectfully submitted,

MICHAEL J. HAYES
ROGER P. FLAHAVEN
Assistant Attorneys General
100 West Randolph Street
13th Floor
Chicago, Illinois 60601
(312) 917-3650

THOMAS P. SULLIVAN*
JEFFREY D. COLMAN
SIDNEY I. SCHENKIER
EDWARD J. LEWIS II
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

* Counsel of Record for State Officials

December 18, 1989